

**IN THE INCOME TAX APPELLATE TRIBUNAL  
“C” BENCH: BANGALORE**

**BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER  
AND  
SMT. BEENA PILLAI, JUDICIAL MEMBER**

ITA No.697/Bang/2022
Assessment Year: 2017-18

BSR Infratech India Ltd. No.851, D Block 15 <sup>th</sup> Cross Sahakarnagar Bangalore 560 092  <b>PAN NO : AADCB5352J</b>	<b>Vs.</b>	Deputy Commissioner of Income-tax Central Circle-2(1) Bangalore
<b>APPELLANT</b>		<b>RESPONDENT</b>

<b>Appellant by</b>	:	Shri Madhusudhan, A.R.
<b>Respondent by</b>	:	Shri Praveen Karanth, D.R.

<b>Date of Hearing</b>	:	13.09.2022
<b>Date of Pronouncement</b>	:	27.10.2022

**O R D E R**

**PER CHANDRA POOJARI, ACCOUNTANT MEMBER:**

This appeal by assessee is directed against the order of CIT(A) dated 14.6.2022 for the AY 2017-18. The assessee has raised various grounds as follows:-

- 1. The Order of the Ld. CIT (Appeals) is opposed to law, facts and circumstances of the case.*
- 2. The Order is passed in haste, without providing sufficient and reasonable opportunity of being heard.*
- 3. The Ld. Assessing Officer erred in disallowing the amount of Rs.27,55,56,113 being deduction claimed by the appellant from its gross receipts on account of retention*

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*money and Ld. CIT (Appeals) erred in confirming the said addition*

- 4. The Ld. Assessing Officer erred in construing that change in recognition principles of retention money amounts to change in method of accounting and Ld. CIT (Appeals) erred in confirming the issue in favour of revenue.*
- 5. The Ld. Assessing Officer failed to consider various landmark judicial pronouncements vide which it has been well settled that retention money is not in the nature of income till the time related contractual obligations are fully performed which stand was upheld by the Ld. CIT (Appeals)*
- 6. The Ld. CIT (Appeals) failed to appreciate that the landmark judgements of various courts including that of the Hon'ble Supreme Court, on taxability of retention money will still hold good despite the insertion of section 43 CB of the Act*
- 7. Notwithstanding the above, the Ld. CIT (Appeals) erred in not appreciating the fact that the appellant had consistently been following the principles of recognizing income upon only its accrual.*
- 8. Notwithstanding the above, the Ld. CIT (Appeals) ought to have considered that the provision of section 43CB of the Act inserted vide the Finance Act, 2017 fastening tax on retention money cannot be read to give effect retrospectively*
- 9. Notwithstanding the above, the contention of the Ld. CIT (Appeals) that the TDS is claimed on retention money, is not valid*
- 10. The Ld. - CIT (Appeals) has erred in restricting the TDS credit to Rs.8,93,06,296 as against Rs.15,67,18,329 legitimately claimed by the Appellant in its return of income*
- 11. The Ld. CIT (Appeals) while arriving at the TDS credit available to the Appellant has erred in disregarding the provisions of section 199 of the Act read with Rule 37BA of the Income tax Rules, 1962*
- 12. The Ld. CIT (Appeals) ought to have appreciated that in accordance with Rule 37BA of the Income tax Rules, 1962 credit for tax deducted at source and paid to the Central Government shall be given for the assessment year for which such income is assessable*

*13.The Ld. CIT (Appeals) ought to have considered the fact that your Appellant following the mercantile system of accounting had offered the income to tax in the year under appeal and thus, was rightfully eligible to claim the TDS credit available on the same*

*14.The Ld. CIT (Appeals) has erred in levying & confirming interest under section 234A, 234B and 234C of the Act on the Appellant.*

*15.The Ld. CIT (Appeals) has erred in confirming the order of the Assessing Officer initiating the penalty proceedings u/s.270A.*

*16.Your appellant craves leave to add, delete or alter any other ground during the course of hearing*

1.1 The crux of the above grounds are relating to only 2 issues. Ground No.2 is not pressed. Hence, dismissed as not pressed.

1.2 Ground Nos.3 to 8 are with regard to taxing of retention money during the year under consideration.

1.3 Ground Nos.9 to 13 are with regard to not granting credit of tax, which was not at all deducted at sources during the year under consideration and consequently which was not getting reflected in Form 26AS.

2. The first ground is with regard to issue of taxing the retention money in the assessment year under consideration. Facts of the issue are that during assessment proceedings it was observed by the AO that the assessee had not offered retention money of Rs 27,55,56,113/- to tax. The issue was duly confronted by the AO to the assessee. In response to the same the assessee submitted that the retention money was receivable subject to certain contractual obligations, being fulfilled by the assessee. The assessee further submitted that the income from retention money was uncertain and hence the same had not been recognised.

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These arguments of the assessee were not accepted by the AO for the following reasons (paras 5 to 8 of the assessment order):

- The assessee had always been recognising income arising out of retention money during the year of retention itself. The assessee had followed the said method in all the earlier assessment years and even in the immediately succeeding assessment year i.e AY 2018-19, the assessee had again recognised income from retention money following the earlier method. Different method for recognition of retention money was followed only during the year under consideration. The assessee has not notified any change in the method of accounting followed by it for the year under consideration and the reasons thereof. As such there wasn't any consistency in the method followed by the assessee for recognition of the retention money during the year under consideration.
- As per Section 145 of the Act, the assessee was required to follow the same method of accounting as followed in the earlier years unless there was some bonafide reason. The assessee could not have followed hybrid method for recognition of its income.
- The assessee had claimed full credit of tax deducted at source (TDS) on the retention money during the year under consideration without offering the income itself to tax.
- As per 'Statement of Significant Accounting Policies and Practices' in the Notes forming parts of the accounts, the assessee has been following the method of percentage completion for its long-term contracts.
- The case laws relied upon by the assessee were not relevant to the facts of the case.

3. The Ld. CIT(A) observed that the undisputed fact is that the assessee has always been recognizing the retention money in the year of retention itself without waiting for it to be actually received. The year under consideration, the search year, is the only exception to the method being followed uniformly by it. The assessee has not brought any-thing on record to show any bonafide reasons for such deviation. The assessee has been following the method of percentage completion for its long-term contracts and as such the expenditure incurred by it is the basis for recognizing revenue. The retention money is just appropriation of the revenue which has already accrued to it on the basis of the above referred method of revenue recognition. The accrual of this income to the assessee has nothing to do with the release of the retention money. The income related to the project accrued to the assessee as soon as the part work was completed by the assessee and relevant bills were submitted by it to the contractee. The retention money is the appropriation of the amount accrued to the assessee and only the release of the same had been made subject to issue of completion certificate and the completion of defect liability period. Since the assessee is following the mercantile system of accounting, so the income was required to be declared by it as soon as the income had accrued to it i.e. when the bills related to the work were submitted by the assessee to the contractee. If the contractee did not immediately release a part of the money to the assessee, then it does not mean that the income had not accrued to the assessee. As per accounting system followed by the assessee, in case at a later stage the amount accrued to the assessee is not actually paid by the contractee due to some reason then the assessee is always free to treat the unrealized money as bad debt and claim the same

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in its P&L account. So as such issue of project completion certificate has nothing to do with the accrual of income to the assessee. So the action of the AO in rejecting the claim of the assessee cannot be faulted with.

3.1 Ld. CIT(A) further noted that that vide *Notification No 32/2015 [F. NO. 134/48/2010-TPL] /SO 892(E), Dated 31-3-2015 'Income computation and disclosure Standard 1 relating to accounting policies'* were notified under Section 145(2) of the Act. (w.e.f. AY 2016-17) and vide *Notification No. SO 3079(E) [NO.87/2016 (F.NO.133/23/2015-TPL)], Dated 29-9.2016 'Revised income computation and disclosure standards (ICDS)'* were notified under Section 145(2) of the Act (w.e.f. AY 2017-18). Part C of the same refers to 'Income Computation and Disclosure Standard III relating to Construction Contracts'. This standard provides that the contract revenue would include retention money and that contract revenue shall be recognised when there is reasonable certainty of its ultimate collection. In the case under consideration nothing has been brought on record by the assessee that there was no certainty of ultimate collection of the retention money. It is the 'reasonable certainty of ultimate collection' which matters. The assessee has performed its part of the contract, incurred the requisite expenses and the contractee has also recognized it. So at present there wasn't any uncertainty that the amount would not be ultimately collected. The retention is only procedural being meant to safeguard some interests of the contractee and nothing has been brought on record by the assessee to show that it didn't intend to carry out the obligations cast on it so as to debar it from ultimately collecting the money in near future. So the condition for recognizing the revenue during the year under consideration was duly fulfilled. In fact, the assessee has also

admitted the same, as it has claimed the credit of related TDS during the year under consideration.

3.2 Ld. CIT(A) further stated that in the case of *Girdharilal & Co. v. Commissioner of Income-tax [1996] 88 Taxman 129 (Rajasthan)/230 ITR 510(Raj)* the High Court held as follows on the issue of such retention money:

*"7. The second question relates with regard to liability of tax on security deducted while making the payment and contract executed by the assessee. The learned AAC was of the view that since the amount has not been received and the assessee was having the mercantile system, but was following the cash system with regard to security, therefore, the amount of security could be taxed only when the amount is received. It was found that the total amount of security is to be restricted to 10 per cent of the value of total work and security was for due and faithful and efficient performance of the contract by contractors keeping in view of the time schedule for completion of the work. The said security could be applied towards any sum due or payable by the contractor which has not been disbursed and has been retained with the Corporation towards meeting wholly or in part any expenditure, damages or losses to which the Corporation may be put as a result of any act of omission or commission, negligence or default on the part of the contractor in relation to the contract and/or for defending or settling claims with respect to sums owing by the contractor to other parties as a result of the contract. It was also contemplated that the Contractor shall promptly deposit with the Corporation such amount as is necessary to restore the security deposit to the full amount and the amount of security deposit was to become due for repayment to the contractor and after deduction of such sums as are due to the Corporation and such further sums to the Corporation is or may be authorized or required to reserve or retain under the terms of contract or otherwise after the expiration of six calendar months reckoned from the date on which the entire work executed in strict conformity with the specification shall have been completed and handed over by the contractor to the corporation and accepted by the latter provided that as at the expiration of the said period of 6 months, the contractor shall have remedied all such defects and paid all such damages as he may have been asked by the Corporation or pay in terms of the provisions of the contract.*

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8. *An argument was raised before the Tribunal that the security deposit is in tile nature of earnest money and that the assessee has followed no system of accountancy. The Tribunal after taking into consideration the terms of contract and the arguments of learned counsel for the parties came to the conclusion that in the present matter the assessee has not followed any system of accounting and even has not shown the opening and closing stock in working progress, the expenses are not fully vouched. It was found that the assessment was framed by invoking the provisions of section 145(2) of the Income-tax Act, 1961 ('the Act) as no proper books of account were maintained and the profits were estimated in the manner indicated in section 144 of the Act. For the deduction of security deposit, it was observed that it form part of the gross receipts because same are appropriated towards the security deposits. The security deposit was required to be deducted 10 per cent from the running bill and was a matter of convenience of depositing. If the amount was deposited independent of deduction by the assessee, he would not have any right to the benefit in respect of such amount of security deposit. The bill amount got transformed into security deposit by the process of deduction. It was considered that the assessee has received the entire amount of bill and deduction therefrom are only appropriation of bill amount. The security deposits are payable after six months of the expiry of contract and the corporation has absolute right to adjust the said security deposit against its claim on contractor. As and when such adjustment is made an independent trading loss would arise to the contractor which may give rise to the liability and one of the mode of satisfying this liability is adjustment out of security deposit.*

9. *We have considered over the matter. The nature of security deposit has to be seen on the basis of contract entered into. It is after the work is performed in part or full, the amount of 10 per cent is deducted from the running bills. The total amount of security has to be 10 per cent of the work done. This amount is for due and satisfactory performance of the contract. The amount which has become due and payable and for which the bill is prepared is the amount which has been considered as receipt by the assessee. The nature of security deposit is like an amount which is kept in trust with the corporation on behalf of the assessee and the corporation is bound to refund the said amount on faithful completion of work. Even if some defect is found, the assessee may recta the same or may prefer to pay the damages or cost thereof That eventuality comes at a later stage and till then the amount of security deposit remains in trust with the corporation on behalf of the assessee. If it is not appropriate towards any liability, it is refunded. At the time when amount is refunded it is not the income but return of the amount which was lying with the corporation and the corporation act as a trustee. The finding which was recorded by AAC was not*

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*found correct on fact as the assessee was not maintaining any books of account and the provisions of sub-section (2) of section 145 were applied while framing the assessment and, therefore, to say that the cash system was followed in respect of receipt of security deposit was not in accordance with law. The deduction of security deposit is appropriation in accordance with contract entered into. To illustrate it further suppose the assessee has to make the payment of Rs. one lakh to the corporation of other dues and after the work is executed, bills are prepared, the said amount which was due and payable by the corporation is deducted from the bill, can in such a situation it be said that the amount of Rs. one lakh has not been received and, therefore, would not be a receipt of the assessee. In our opinion, the total amount for which the bills were prepared is the receipt and deduction therefrom no security deposit is only appropriation of the amount to that extent which the assessee could have otherwise paid and, therefore, the assessee was not justified in reducing the amount of security deposit from the corporation receipt to arrive at its true income. In view of the position of law, we are of the opinion that the Tribunal was not right in including the value of the material supplied by Hindustan Copper Ltd. and Instrumentation Ltd. to the assessee for calculating the gross profit rate. The question No. 1 is answered in favour of the assessee and against the revenue.*

*10. So far as the question No. 2 is concerned, the Tribunal was right in holding that estimating the income of the assessee no allowance need be given for security deposits deducted from the running bills of the assessee. Accordingly, the question No. 2 is answered in favour of the revenue and against the assessee. No order as to costs."*

3.3 Thus the High Court held that the retention money (retained as security deposit from running bill) was not to be allowed to be deducted from the income of the assessee as it was only appropriation of income. As regards the reliance of the assessee on various case laws, the same is found to be misplaced as none of the relied upon cases relates to the business of construction of infrastructure projects where income is being recognised on the basis of percentage completion method. In this method of income recognition, the income is recognised on the basis of the percentage of the work completed and it has nothing

to do with the actual receipt of the money. So even if certain payments are not released by the contractee, the income would not change. In fact, in the case under consideration the assessee has shown various other receipts without actual receipt of the same from the same very contractee. This concept of revenue recognition has not been taken into account in the various decisions relied upon by the assessee. Further, the notifications, as 'discussed supra were never considered by the appellate bodies, the said decisions being rendered much earlier.

3.4 Ld. CIT(A) stated that one of the arguments of the assessee is that it has already declared part of the retention money as its income in subsequent years. However, this argument of the assessee would not make any difference. This is a settled law that income needs to be taxed in a year to which it belongs on the basis of the provisions of the Act. It does not depend on the whims of the assessee to chose the year in which it wants to disclose its income. If allowed to do so, the postponement of the income and thus tax liability would continue indefinitely. The payment of correct taxes in the relevant year by the assessee enables the Government to timely get its share of revenue and thus avoids the burden of interest which it would otherwise be required to bear on account of borrowings if there is shortfall in tax collection. Further, even an AO too does not have an option in this matter and the income is required to be assessed as per law in the relevant assessment year only. Against this assessee is in appeal before us.

4. Ld. A.R. submitted that as per Section 5 of the Income Tax Act,1961, the income is to be recognised only under the following circumstances.

(a) is received or is deemed to be received in India in such year by or on behalf of such person ; or

(b) accrues or arises or is deemed to accrue or arise to him in India during such year; or

(c) accrues or arises to him outside India during such year

Thus income can be taxed only on accrual or on receipt basis during the financial year.

4.1 As regards retention money under the Income Tax Act 1961, as applicable to A Y 2017-18 is not at all taxable. However it can be taxed only after crystallization upon successful completion of contract and if the performance guaranteed is successful. Assessee has been recognising its retention money as part of revenue as per the principles laid down in the AS-7. Further, retention money is receivable over a period of Two to Three Year on satisfactory completion of contract and as per the terms and condition in the agreement between employer and contractor. The said retention money which is claimed as deduction during the year has already been offered to tax in subsequent years in the Returns of Income filed by the assessee company as per closure of Bank Guarantees towards security deposit, which is evident from the following:

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Retention Money Claimed in F Y 2016-17 275556113

Declared in 2017-18 AY 2018-19	23388053	
Declared in 2018-19 A Y 2019-20	37291220	
Declared in 2019-20 A Y 2020-21	61114463	
Declared in 2020-21 AY 2021-22	105920791	227714527
Balance Retention Money pending		<b><u>47841586</u></b>

4.2 In view of the above taxing the same amount in different years amounts to double taxation of the income which is already offered to tax. Further, assessee relied on various judicial decisions upholding the view of Retention money forming part of income and being assessed to tax only upon accrual basis which are as follows:-

- (i) High Court of Bombay in the case of Commissioner of Income Tax vs Associated Cables (P) Ltd (286 ITR 596) (Born) held that *"The right to receive the retention money is accrued only after the obligations under the contract are fulfilled and, therefore, it would not amount to an income of the assessee in the year in which the amount is retained"*.
- (ii) High Court of Madras in Commissioner of Income Tax vs East Coast Constructions and Industries Ltd (283 ITR 297) (Mad) held that *"moneys retained by the contractee, as a percentage of the bills raised to be paid after the contract was completed, were to be treated as income only when the moneys were actually received, even though the assessee was following a mercantile system of accounting"*.
- (iii) High Court of Madras in Commissioner of Income Tax vs Ignified Boilers (I) Ltd. (283 ITR 295) (**Mad**) held that *"The assessee was entitled to receive the amount only after successful completion of work. In such circumstances, it could not*

*be said that 10 per cent, retention money retained by the principal contractor accrued to the assessee during the relevant-assessment year for consideration".*

- (iv) The ITAT Mumbai 'D' Bench (70 ITD 109) (Mumbai) in the case of Corrosion Control Services (Bombay) (P) Ltd. Vs Deputy Commissioner of Income Tax, *held that "Assessee followed mercantile system; retention money was deducted from contract receipts; entire amount of bill did not become due immediately upon its submission; 5 or 10% of the bill amounts were withheld as security as per the terms of the contract; the assessee had no right to receive the retention money which was to become due only on completion of entire contract and furnishing of requisite certificate; retention money is liable to be taxed in the next year and not in the year under consideration ; crediting of the amount in the books of account is totally immaterial.*
- (v) Visakhapatnam Tribunal in the case of India Fruits Ltd. Vs Assistant Commissioner of Income Tax(2003) (86 ITD 228) (Visakha) was of the view that "*part of amount receivable by the assessee against supply of goods which was withheld as per the terms of the agreement and was to be paid only on fulfillment of conditions specified in the agreement could not be said to have accrued to the assessee until those conditions were satisfied, even though assessee followed mercantile system of accounting"*
- (vi) In the case of Associated Cables (P) Ltd. Vs Deputy Commissioner of Income Tax (1994) 206 ITR 48(AT) (Born) the facts and decision taken are as follows: "*The assessee followed mercantile system of accounting. As per contract with customers, 10% of the payment was to be made to the assessee on receipt and acceptance of goods subject to performance and workmanship bank guarantee for that 10%. It was held that though this amount was received by the assessee, it referred to this 10% of the price as retention money as*

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*it took the view that it could not be appropriated until the period of guarantee was over*

4.3 Ld. A.R. requested to consider above case laws while adjudicating this appeal

4.4 He submitted that Central Board of Direct Taxes notified Income Computation Disclosure Standards (ICDS) vide Notification no 87/2016 dated 29th September, 2016 mandating all the assesseees following mercantile system of accounting to follow ICDS. Therefore, vide this notification ICDS is applicable for assessee's following mercantile system of accounting to compute Income Tax under the head "Profits and gains of business or profession" or "Income from other sources" and is applicable from FY 2016-17 and subsequent years.

4.5 The general practice was to offer the retention money to tax when the contract/ delivery of goods and services is successfully completed and when the performance guaranteed is successful.

4.6 As per para 9 of ICDS III, **Contract revenue** shall be recognised when there is reasonable certainty of its ultimate collection. As per para 10 of ICDS III, Contract revenue shall comprise of the initial amount of revenue agreed in the contract, **including retentions**. In reference to the transition provision as enumerated in para 22.8 & 22.9, Provisions of ICDS III with respect to such contracts states that Contract revenue and contract costs shall be recognised based on the method regularly followed prior to the 1st April, 2016. When there is no reasonable certainty of ultimate collection. In such case, the same need not be recognized as per ICDS —III. The change

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in recognising the contract revenue by excluding retention money wherein it was included in previous years will not amount to a change in accounting policy since the recognition of Retention money is not a change in principle. In the light of the above Ld. A.R. requested to consider the prayer of the assessee favourably in the interest of natural justice and equity. He requested that the demand raised unjustly by the Ld. Assessing Officer may please be deleted in the interest of natural justice and equity, as it can also be seen that the same income has already been offered to tax, and taxes paid on the same in subsequent years, which goes to show the bonafides of the assessee in offering the income to tax and not to evade any income from getting taxed.

5. The Ld. D.R. relied on the order of Ld. CIT(A) and submitted that the income has been accrued to the assessee and on which TDS has been deducted by the payer. According to him in accordance with provisions of section 194C, once the TDS has been deducted, the corresponding sum of retention money for which TDS has been deducted is deemed to be the income of the assessee and hence, accrued income to be taxed in the hands of the assessee in the assessment year under consideration. According to Ld. D.R., deduction of tax at source by any person clearly determines that such expenditure has been booked by and the person has clearly identified such expenditure and acknowledged the same by deducting tax at source. The Ld. D.R. further submitted that retention money be actually released, and accrual has been taken place when the tax has been deducted at source and the payment of tax cannot be postponed when the assessee acquired a right to receive the income. Therefore, the income can be said to have acquired to have accrued to him and the payment has been received by the assessee. The providing of

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bank guarantee to receive the payment cannot postpone the tax liability since the assessee has regularly adopted mercantile system of accounting and the right of the assessee on the income arose on the date on which tax has been deducted at source by the deductor in accordance with the provisions of section 194C of the Act. According to him, the case laws relied by the Ld. A.R. not consider these aspects, hence cannot be applied and it is also not considered the fact that whether accrual of the income arises once tax has been deducted at source and also further if the credit of tax deducted at source has been claimed by assessee in its return of income, then whether income has to be correspondingly taken into account by the assessee or not.

6. We have heard the rival submissions and perused the materials available on record. The main contention of the assessee's counsel is that the assessee is engaged in infrastructure sector, primarily in construction of buildings, roads, layouts, bridges, water supply utilities with State & Central Government and Public Sector Undertakings. The assessee is participating in tenders and getting the contracts from the State & Central Government. On execution of the contracts, assessee issues the running bill. At the same time, assessee is given the bank guarantee to the respective parties for the proper performance of the contract executed by the assessee. After due negotiation, assessee received a portion of completed contract amount as per bill issued by the assessee. However, certain percentage of contract amount has been retained by the parties concerned and retention amount has been released to the assessee after providing bank guarantee and the right to receive the said amount has not been accrued to the assessee though there was a flow of contractual receipt to the hands of the assessee, which was not a right flow of fund. However, the flow of that amount without any right to receive the same and it was submission of Ld. A.R. that

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at any time, the payer can recall the said amount by revoking the bank guarantee furnished by the assessee to the respective parties against the release of said retention money. Thus, Ld. A.R. made a plea that assessee had no right to receive the money by virtue of the contract between the parties and assessee also had no right to enforce the payment and therefore, the department could not include the said amount which is retention money in the assessment year under consideration when actually this amount had not been paid to the assessee in true sense. It is also submitted by Ld. A.R. that the said retention money has been offered for taxation in subsequent assessment years when the right to receive said amount was actually accrued to the assessee that too after clearance of the defect liability.

6.1 Under section 5 of the Act, the total income of the assessee in any previous year in case of resident includes all incomes, profits and gains from whatever sources derived, which are received or deemed to be received in the taxable territory in such year by or on behalf of such person, or accrue or arise or deem to accrue or arise to him in the taxable territory during such year or having accrued or arisen to him without a taxable territory before the beginning of such year. Thus, it is not necessary that the income should be received by the assessee only. However, all receipts do not constitute income and do not come within the ambit of the Act. If income not received but accrued to the assessee, then it is taxable vice-versa if the income received but not accrued it is not taxable. In other words, though there is actually or constructively received but accrued then it is deemed to be received by the assessee. Receipt itself is not sufficient to bring a receipt within the clutches of taxation. In order to bring a receipt into taxation, it should be income and it ought to have been accrued to the assessee in the relevant assessment year. The question as to when exactly an assessee is said to have received the income or profits has to be largely determined with reference to the

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system of accounting employed by him. Where according to the method followed by the assessee, the same was received by him during the year of account, and it seems, that he was bringing into account the sales reflected by him and not maintaining accounts of the stocks he had, nor was he in the habit of taking inventory of the stocks on hand, the same clearly shows that he treated that income as received only as when he has sold the stock. In these circumstances, the excess sales as well as excess stock revealed in the accounting year can be charged to tax. Thus, it is clear, that income accrued to the assessee, without the actual receipt of the same. If the assessee acquires the right to receive the income, the income can be said to have accrued to him, though it may be received later on its being ascertained. The basic conception is that he must have acquired a right to receive the income. There must be a debt owed to him by the parties concerned to whom he executed the contract. Unless and until there is a creation of right in favour of the assessee, debt due by somebody it cannot be said that he had acquired a right to receive the income or that income, has accrued to him (E.D. Sasoon & Co. Ltd. Vs. CIT (1954) 26 ITR 27 SC). It is no doubt that the accrual of income does not depend upon the accounts maintained by him. The accounts may be made up at a much later date. That depends upon the convenience of the assessee and also upon the exigency of the situation. The amount of the income, profits or gains may itself be ascertained later on the accounts being made up. But when the accounts are thus made up, the income, profits & gains ascertained as a result of the accounts or referred back to the chargeable accounting period during which they have accrued or arisen and the assessee is liable to tax in respect of the same during that assessment year. In other words, the treatment accorded by assessee in his books of accounts does not affect the true nature of the receipt. For this purpose, we place reliance on the judgement of

Hon'ble Supreme Court in the case of CIT Vs. Shoorji Vallabhadas & Company (46 ITR 144).

6.2 While determining the income of the assessee in particular assessment year, the legal consequences of the transaction must be kept in mind and should be taken as guiding factor for arriving at a decision from the point of view of the incomes as well. This is because of fact that what is sought to be taxed under Income Tax Act is that commercial profits and not theoretical or notional income, unless the statute otherwise provides for imposing the tax on a notional basis by legislative fiction. In other words, if income does not result at all, there cannot be a tax even though the assessee made an entry in the books of accounts with regard to hypothetical income which does not accrue to the assessee. The character of the receipt offered as a trading receipt or as an income should not be based on the name given to the amount received by the assessee in his books of accounts because in law the real nature and character of the transaction must be determined in the light of treatment of the contract and the rights and obligations of the parties flowing therefrom unguided by the nomenclature of the transaction. For this purpose, rely on the judgement of Hon'ble Supreme Court in the case of National Cement Mines Industries Ltd. Vs. CIT (42 ITR 69) (SC).

6.3 While determining the nature of the receipt as being a trading receipt taxable as income from business or profession or otherwise, one should be guided by the terms of the agreement entered into between the parties. Revenue authorities cannot ignore the genuine agreement between the assessee and the concerned parties from whom the said amount has been received. In the absence of any situation or allegation or collusion, the revenue cannot resort to any attempt to rewrite the agreement with a view to impose the levy of tax shall be when the transaction between the parties are at arm's length.

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For this proposition we rely on the judgement of Hon'ble Delhi High Court in the case of D.S. Bist & Sons (149 ITR 276), wherein held that "The Act does not clothe the taxing authorities that any power or jurisdiction rewrite terms of agreement entered into, particularly in view of the finding of the Tribunal that "there is nothing to suggest the parties were not belong with each other at arm's length and there is no situation of any collusion, commercial expediency of the contract is to be adjusted by the contracting parties as to its terms. It was further made clear that ..... under the taxing system it is up to the assessee to conduct his business in his wisdom. The assessee may enter into commercial transaction with other party who has ad idem with the assessee as to the terms & conditions. In the absence of any collusion between the two, it is not possible to vary the terms." Further, Hon'ble Supreme Court in the case of National Cements Mines Ltd. Vs. CIT (42 ITR 69) held that "in assessing the true character of the receipt for the purpose of income tax, inability to ascribe to the transaction a definite category is of little consequence. It is not the nature of the receipt under the general law. But in the commerce that is material." Further, it was held by the Bombay High Court in the case of CIT Vs. Scindia Workshop Ltd. (119 ITR 526) that the revenue authorities must examine the transaction and arrive at a conclusion having regard to the nature of the receipt from the commercial point of view that the particular reference to the relevant provisions of the income tax. Further, the Hon'ble Karnataka High court in the case of Addl. CIT Vs. Mahatrashttra Apex Corporation Ltd. (116 ITR 616), wherein held that "the fact that in an earlier year, a particular receipt was not subject to tax cannot give rise to an inference that the mere receipt in the subsequent years would not also be taxable because the absence of an assessment to income tax in an earlier year is not to be equated with the decision of the subject

relation to a similar amount, which is pending consideration in a subsequent year.”

6.4 Further, it was held by the Hon'ble Supreme Court in the case of CIT Vs. Kamal Beharilal Singha (82 ITR 460) (SC) that “a question of assessment to income tax would arise for consideration only in the hands of the recipient and, therefore, its character as income taxable or not must be determined only to the reference of legal position of the recipient. Thus, the question whether a particular receipt is in the nature of income or not and would be liable to tax or not, primarily for the AO to decide but having regard to the facts and circumstances of the case and in accordance with law. Further, in the case of CIT Vs. Associated Cables Pvt. Ltd.(286 ITR 596) the Bombay High Court held that--

*“The question of law sought to be raised in this appeal is as to whether the retention money could be considered to be the income of the assessee in the year in which the amount was retained. The Income-tax Appellate Tribunal has referred to a judgement of the Tribunal in Associated Cables P. Ltd. V. Deputy CIT (1994) 206 ITR (AT) 48 (Bom). Mr. Sathe appearing for the respondent has, however, drawn our attention to two judgements, viz., of the Calcutta High Court and the Madras High Court. The Calcutta High court judgement is reported in CIT Vs. Simplex Concrete Piles (India) P. Ltd. (1989) 179 ITR 8. A Division Bench of the Calcutta High Court in that matter has held that the payment of retention money in the case of contract is deferred and is contingent on satisfactory completion of contract work. The right to receive the retention money is accrued only after the obligations under the contract are fulfilled and, therefore, it would not amount to an income of the assessee in the year in which the amount is retained. The other judgement relied upon is in the case of CIT Vs. Ignifluid Boilers (I) Ltd. reported in (2006) 283 ITR 295 (Mad). In that judgement also, a Division Bench of the Madras High Court has held that the amount retained does not accrue to the assessee and, therefore, the assessee would not be liable.”*

6.5 Further, Madras High Court in the case of CIT Vs. East Cost Construction and Ind Ltd. (283 ITR 297), wherein held that “*the assessee was entitled to receive the retention money after completion of the contract.*

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*On the date of the bills, no enforceable liability had accrued or arisen. When the assessee had no right to receive the money by virtue of the contract between the parties and the assessee also had no right to enforce payment, it could not be said that the right to receive payment of the remaining 10 percent of the value of job had accrued.”* In view of the discussion, the amount has not accrued to the assessee. The right to receive will accrue only after fulfillment of condition laid down in contract entered by the respective parties only then this amount cannot be said to be accrued to the assessee. Even if it is received against bank guarantee the bank guarantee could be revoked at any time at the pleasure of the payee. In such circumstances, this impugned amount cannot be brought to tax in the assessment year under consideration. More so, the said amount was actually offered for tax in subsequent assessment year and the department accepted the same in the subsequent assessment as income of the assessee and bringing the same amount to tax in this assessment year amount to double taxation, which cannot be permitted.

6.6 Further, Coordinate Bench of Kolkata in the case of *Stewarts & Lloyds of India Ltd.* in ITA No.1169/Kol/2017 & Others vide order dated 15.3.2019 held as under:-

*“4. The first common issue that arises for consideration in all these appeals is the rejection by the revenue of the claim of the assessee that retention money is not income of the assessee as it has not accrued or arisen during the year. Both the parties have advanced lengthy arguments on the issue. On consideration of the facts and arguments we find that the issue is covered by the decision of the Hon'ble Jurisdictional High Court in the case of *Commissioner Of Income-Tax vs Simplex Concrete Piles (India) Pvt. Ltd.* 1989 179 ITR 8 Gal, wherein it was held as follows:-*

*“Section 5 of the Income-tax Act, 1961 - Income - Accrual of - Assessment years 1965-66 and 1966-67 - Assessee-Company was carrying on construction business and followed mercantile system of accounting - As per terms of contracts entered into with various parties assessee was*

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*entitled to get 90 per cent of payment in first instance when work was done and remaining 10 or 5 per cent, as case may be, was to be paid later on after submitting certificates from architects/engineers, removal of defects, payment of damages, etc. - Assessee was crediting 100 per cent of job value in past years but from assessment year 1965-66, it had started practice of crediting only 90 per cent value for work done after deducting retention money -Whether it could be said that on date of submission of bills assessee had no right to receive entire amount on completion of work and retention money did not accrue to it on such date but on later date in accordance with terms of contracts and ITO would be unjustified in making any addition by treating entire contract amount as accrued on submission of bills on completion of work - Held, yes"*

5. *The decision of the ITAT Mumbai 'H' Bench of the Tribunal in the case of Emerson Network Power India (P.) Ltd. v. Assistant Commissioner of Income-tax [2009] 27 SOT 593 (MUM.) relied upon by the Id. D/R is not applicable to the facts of the case, for the reason that, what was considered by the Bench was performance bank guarantee and not retention money as in the case of the assessee company.*

*Even otherwise, we are bound by the judgment of the Hon'ble Jurisdictional High Court in the case of Commissioner of Income-Tax vs Simplex Concrete Piles (India) Pvt. Ltd.*

*ITA No. 1169/Ko1/2017 Assessment Year: 2007-08 ITA No. 1170/Ko1/2017 Assessment Year: 2007-08 ITA No. 1171/Ko1/2017 Assessment Year: 2008-09 ITA No. 1172/Ko1/2017 Assessment Year: 2009-10. M/s. Stewarts & Lloyds of India Ltd 5.1. We also find that the reliance placed by the Id. D/R on the judgement in the case of E.D. Sassoon & Co. Ltd. v. Commissioner of Income-tax [1954] 26 ITR 27 (SC), is also misplaced as the Hon'ble Supreme Court was considering a case where the assessee had acquired the right to receive the income. In the case on hand, the assessee had no right to receive the income.*

6. *In view of the above discussion, we uphold the contention of the assessee and direct the Assessing Officer to exclude the retention money included in the sales. This retention money can be brought to tax in the year when the assessee received the same. Accordingly this ground of the assessee is allowed for all the Assessment Years."*

6.7 Further, Coordinate Bench of Kolkata in the case of DCIT Vs. EMC Limited in ITA No.2149/Kol/2017 dated 27.5.2020 held as under:-

*“23. Having heard both the parties and after perusal of records, we note that the assessee had filed its original return of income on 29.11.2014 showing total income of Rs.194,46,16,540/-. Thereafter the assessee’s case was selected for scrutiny and notices u/s. 143(2) of the Act dated 31.08.2015 was served upon the assessee. The AO noted that the assessee thereafter had filed revised income tax return on 17.03.2016 revising its income to Rs.49,98,06,980/-. The assessee explained that when the original return was filed on 29.11.2014 it was on the basis of profit as per the P&L Account without considering the deduction made by parties (customers) on account of retention money. However, the assessee on proper application of the legal and factual position realised that company’s real income is much less than the revenue booked in the account and hence, revised return was filed on 17.03.2016 claiming deduction of the retention money debited by the parties during the year amounting to Rs.142,53,74,710/-. It was also brought to the notice of the AO that as per the contract between the parties certain percentage of the bills raised as per agreement can be retained by the contractee party as retention money which would be payable only after successful completion of the entire contract after it being certified by the party and after fulfilment of certain pre-determined conditions mentioned in the contract. Thus, it was explained to the AO that as per the accounting practise followed by the party though a part of the bill amount was retained by the contractee party and would be paid afterwards on agreed conditions, the assessee in its books of account has booked the entire revenue as and when the bills were actually raised and hence, the entire amount was reflected in the revenue from the operations in the P&L Account. It was brought to the notice of the AO that due to the said practise profit before tax as per P & L Account for the year ended on 31.03.2014 is Rs.204,38,30,030/- and the said profit was arrived after taking into account entire bills raised on parties for contract work including the retention money. It was explained further that thereafter, sales was credited and the party was debited with the entire bill amount and on that basis assessee had filed the original return on 29.11.2014 without considering the actual deduction made by the parties on account of the retention money and had shown total income of Rs.194,46,16,540/-. And when the assessee realised that its real income was much less than the revenue booked in the account it filed a revised return on 17.03.2016 claiming deduction of the retention money which was deducted by the parties to the tune of Rs.142.53 cr. and thus in the revised return income to the tune of Rs.49.98 cr.*

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*was shown. This explanation of the assessee was not accepted by the AO and he disallowed the deduction claimed by the assessee in respect of retention money to the tune of Rs.142,53,74,710/- and was added back to the income of the assessee. On appeal, the Ld. CIT(A) was pleased to allow the claim of the assessee and directed the AO to exclude the retention money from the total income. However, the Ld. CIT(A) also directed that TDS claimed by the assessee relating to such retention money should be disallowed in this assessment year and added that it may be allowed in the year in which the assessee declares the retention money as its income. Aggrieved by the aforesaid action of the Ld. CIT(A) the revenue has preferred the appeal. We note that the assessee is in the business of supplying erection and commissioning of electricity transmission towers, line powers, sub-station etc. the assessee continued the construction job for M/s. Power Grid Corporation of India Ltd., M/s. Transmission Corporation of Andhra Pradesh Ltd., M/s. West Bengal State Electricity Distribution Corporation Ltd., M/s. Maharashtra Electricity Transmission Co. Ltd. The assessee had raised bills on the parties on progressive completion of particular project and credited the gross bill amount in its books of account which was reflected in the audited Balance Sheet under the head "Revenue from operations." The assessee maintained books of account on mercantile basis and the revenue was recognized on the basis of progressive partial completion of particular project and the bills were raised accordingly. As per the contract between the parties there were clauses in the contract that the contractee shall retain specified percentage of the billed amount till successful completion of the entire project. The ld. AR drew our attention to the contract with M/s. Power Grid Corporation of India Ltd. wherein it is stipulated that the balance 10% of the erection process component (excluding processed component) for survey shall be paid after successful commissioning of the transmission line and issuance of taking over certificate. So, the final payment would be given as per the contract after the successful commissioning of the transmission line and issuance of taking over certificate by the Power Grid meaning the retention money would be given only after successful commissioning and after issuance of the taking over certificate. According to the assessee, as per such duly executed contract entered into between the parties, the contractee had retained specified percentage of the bills amount as retention money and in this assessment year these parties have retained a sum of Rs.142,53,74,710/- as retention money on the bills raised during the year. In the light of the said fact, according to assessee, it was neither entitled nor it could have claimed the retention money as income accrued till the entire project was commissioned. And since the projects were not completed during the year under consideration, the retention money has not accrued as income of the assessee and, therefore, assessee claimed deduction of the same. It*

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*was also brought to our notice that retention money would be included in the respective years when the project will be completed and it was also brought to our notice that a part of the said retention money retained by the parties were disbursed to the assessee in the succeeding assessment years, and which were duly offered as income in the assessment years 2015-16 to 2017-18 when particular projects got completed and have duly been included in the return of income during the respective assessment years from AYs 2015-16 to 2017-18 and consequently there is no revenue loss at all. However, we note that the AO has rejected the claim of the assessee on the ground that the assessee had credited the amount of gross bill in its books of account which included the retention money in the accounts as also in the P&L Account and reflected the same in the original return of income filed by the assessee. The AO also noted that the assessee claimed TDS which was deducted on the gross bill and the assessee had claimed credit for TDS including the TDS of retention money during the year. Therefore, according to AO, the retention money has to be included as income accrued in this assessment year. We note that the Ld. CIT(A) has taken care of the TDS issue and the assessee has not preferred to challenge the action of Ld. CIT(A) which crystallizes. Therefore, the direction of the Ld. CIT(A) to the AO to disallow the TDS credit claimed in respect of the retention money not shown as income by the assessee in the revised return and to allow it in the year in which the assessee declares retention money as its income takes care of the TDS credit even if erroneously claimed by the assessee in respect of the retention money. We note from the relevant clauses of the contract that the contractees had the right to withhold certain percentage of the consideration till the conclusion of the project and only after certification of concluded projects the retained portion of the amounts are disbursed finally which may be in the succeeding assessment years and is contingent upon the terms and conditions of the contract. We also note that the AO has not disputed the amount which has been retained by the contractees. In such a scenario, merely because the assessee had booked the income in this year without actual receipt of it, cannot be chargeable to tax as per the Act. The reasons given by the AO to disallow the claim of the assessee cannot be sustained and was rightly repelled by the Ld. CIT(A) whose view to accept the claim of assessee is based on the accepted judicial precedents laid down by the Hon'ble jurisdictional High Court in CIT Vs. Simplex Concrete Piles (supra); Hon'ble Gujarat High Court in Anup Engineering Ltd. (supra); Hon'ble Bombay High court in CIT Vs. Associated Cables P. Ltd. (supra) and Hon'ble Madras High Court in CIT Vs. Ignifluid Boilers (I) Ltd. (2006) 283 ITR 295 (Mad). We hold that in the factual circumstances especially as per the terms of contract between the assessee and the contractee, the retention money retained by the contractee is deferred payment and is contingent upon satisfactory completion of contract work. We hold that the*

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*right to receive the retention money is accrued only after the obligations under the contract are fulfilled and the assessee had no vested right to receive the same in this assessment year, therefore, it would not amount to an income of the assessee in the year in which it is retained. Therefore, we do not find any infirmity in the order of the Ld. CIT(A) and so, we confirm it and dismiss the appeal of the Revenue.*

6.8 In the present case, as per contract entered by the assessee with the parties assessee not entitled to receive 100% of the bill raised by the assessee against the parties and there is a retention process in all the tender documents and that retention amount could be claimed by assessee only by furnishing 100% bank guarantee and the parties concerned could recall the said amount and recover same from the assessee by revoking the bank guarantee furnished by the assessee. Being so, there is a liability attached to the assessee with regard to receipt of this retention money. Being so, in our opinion, the lower authorities committed an error in bringing the retention money into tax in this assessment year under consideration and the same to be taxed in the assessment year when it was actually accrued to the assessee. Accordingly, we delete the addition. This ground of appeal of the assessee is allowed.

7. Next ground is with regard to non-granting of credit of tax, which was not at all deducted at sources during the year under consideration and consequently, which was not getting reflected in Form No.26AS.

8. The Ld. A.R. submitted that it is a well settled principle that a tax payer should be given credit for TDS in the year in which the corresponding income is offered to tax. The payer/ deductor shall deduct tax at source at the time of payment or at the time of credit of such sum to the account of the payee, whichever is earlier. However, the payee/ deductee shall offer the income to tax based on the method of accounting followed. The issue

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arises when tax has been deducted by the deductor in one assessment year or over a period and income has been offered to tax in the hands of the deductee in different assessment year. In the Income Tax Act, 1961, Chapter XVII contains the provisions relating to collection and recovery of tax. Section 199 of Chapter XVII provides for claiming of credit for tax deducted and authorize the board to notify the rules for claiming tax credit. The extract of the section is reproduced below:-

*"(1) Any deduction made in accordance with provisions of Chapter — XVII Collection and recovery of tax (TDS Provisions) and paid to the Central Government shall be treated as a payment of tax on behalf of the person from Whose income the deduction was made, or of the owner of the security, or of the depositor or of the owner of property or of the unit-holder, or of the shareholder, as the case may be*

*....."*

8.1 In this regard Rule 37BA has been notified. The Rule 37BA reads as follows,

*"(1) Credit for tax deducted at source and paid to the Central Government in accordance with the provisions of Chapter XVII, shall be given to the person to whom payment has been made or credit has been given (hereinafter referred to as deductee) on the basis of information relating to deduction of tax furnished by the deductor to the income-tax authority or the person authorised by such authority*

*....."*

*(3) (i) Credit for tax deducted at source and paid to the Central Government, shall be given for the assessment year for which such income is assessable.*

*(ii) Where tax has been deducted at source and paid to the Central Government and the income is assessable over a number of years, credit for tax deducted at source shall be allowed across those years in the same proportion in which the income is assessable to tax.*

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8.2 Thus, sub-rule 3 of Rule 37BA provides mechanism for taking credit in cases, where income is assessable in a different assessment year other than the assessment year in which tax has been deducted. As per the said rule, TDS credit can be claimed across the years in which the Income is offered to tax.

8.3 Ld. A.R. further submitted that in the case of Shri Anupallavi Finance vs Department of Income Tax, the Honourable Chennai Tribunal held that *"the issue arising for our adjudication, i.e., the year of allowance of credit for TDS stands addressed by the clear language of the provisions itself. The same, rather, presents an ideal situation where the course yielded by plain common sense matches with that statutorily provided, i.e., allow credit for TDS against the corresponding income on its assessment..."*

8.4 From the above, it can be understood that where tax has been deducted by the deductor in one assessment year or over a period, it can be claimed by the deductee as and when the income is offered to tax as per the method of accounting followed by the deductee.

Scenerio 1:- Tax is deducted in one or more assessment years for income pertaining to current assessment year

8.5 Ld. A.R. submitted that as per Section 205 of the Income Tax Act, 1961 *"Where tax is deductible at the source under sections 192 to 194, section 194A, section 194B, section 194BB, section 194C, section 194D, section 194E, section 195 and section 196A, the assessee shall not be called upon to pay the tax himself to the extent to which tax has been deducted from that income"*.

8.6 He submitted that the plain reading of the section makes it clear that where tax is deductible and the same has already been deducted, the deductee shall not be called to pay the tax so deducted. This implies that to the extent of TDS credit available, demand cannot be raised on the deductee.

8.7 Ld. A.R. also submitted that in the case of Executors of the Estate of S. Shanmuga Mudaliar Vs. The Assistant Commissioner of Income Tax, dated 11/08/2014, the honourable Madras High court held that *"Sec 205 of the Income Tax Act prevents the department from demanding the tax deducted at source from the assessee who has suffered a deduction by referring to the following case laws and decision was made in favour of the assessee. "*

8.8 He further submitted that Bombay High Court in the case of Yashpal Sahnivs Asst. CIT (Born.) reported in (2007) 293 ITR 539 held that *"when the tax is deducted at source, the same cannot be levied once again on the assessee who has suffered the deduction. Once it is established that the tax has been deducted from the salary of the employee, the bar under section 205 of the Act comes into operation and it is immaterial as to whether the tax deducted at source has been paid to the Central Government or not, because elaborate provisions are made under the Act for recovery of tax deducted at source from the person who has deducted such tax".*

8.9 Following the above judgment, Karnataka High Court in the case of Smt. Ansuya Alva vs. Deputy Commissioner of Income Tax reported in (2005) 278 ITR 206, interpreting Sec.205, has held that *"If we look at the scheme for the provision of deduction of tax at source, it becomes obvious that such person is acting on behalf of the Revenue, i.e., as an agent of the Revenue. In fact, the person is enabled statutorily to make deduction and remit the amount to the Central Government. Even on the general principles of law, the Law of Principal and Agent, as discussed above, for a default of the agent of the Revenue, the petitioner-assessee, who is a third party in relation to such*

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*relationship cannot be penalised. In the circumstances, I am of the view that the Revenue is to be definitely restrained in terms of Section 205 of the Act from enforcing any demand on the assessee-petitioner insofar as the demand with reference to the amount of tax which had been deducted by the tenant of the assessee in the present case, and assuming that the tenant had not remitted the amount to the Central Government. The only course open to the Revenue is to recover the amount from the very person who has deducted and not from the petitioner.”*

**Scenerio 2:- TDS credit is available in current year, pertaining to income offered to tax in previous years**

8.10 Ld. A.R. submitted that if income is offered to tax in previous years and tax in respect of the same is deducted in current year, then the TDS credit shall be available to the deductee in the current year upon deduction, if the same is not claimed in the year in which the Income is offered to tax. This is evident from the judicial pronouncement of **Hon'ble High Court of Punjab and Haryana** in the case of **CIT Vs. M/s. Abbott Agency, Ludhiana**.

**Scenerio 3:- TDS credit is not available in current year for Income pertaining to current year TDS deducted but not deposited by the deductor pertaining to current year Income**

8.11 In case where TDS certificates are not available on default of the deductor then TDS credit cannot be denied to the assessee.

8.12 Ld. A.R. submitted that the Delhi High Court has in Court On Its **Own Motion Vs. CIT 352 ITR 273** directed the department to ensure that credit is given to the assessee even where the deductor had failed to upload the correct details in

Form 26AS on the basis of evidence produced before the department.

8.13 Therefore, Ld. A.R. requested that the department is required to give credit for TDS once valid TDS certificate had been produced or even where the deductor had not issued TDS certificates on the basis of evidence produced by assessee regarding deduction of tax at source and on the basis of indemnity bond.

2016-17		
ITR	Turnover	TDS
	7,15,79,59,618.00	15,48,25,989.00
<b>26AS</b>		
2016-17	3,54,15,38,245.00	8,35,62,348.00
<u>2017-18</u>	3,07,65,94,388.00	6,22,97,711.00
2018-19	11,60,93,500.00	21,95,565.00
2019-20	2,21,82,405.00	3,35,379.00
2020-21	3,01,70,834.00	8,04,691.00
2021-22	1,59,29,011.00	3,18,580.00
<b>TOTAL RECEIVED</b>	<b>6,80,25,08,383.00</b>	<b>14,95,14,274.00</b>
<b>Amounts not reflected in 26AS</b>		
Deduction of TDS evidenced by RA Bills only available and not reflected in 26AS	13,91,75,992.00	24,04,991.00
Provision to be received	10,51,70,232.00	17,47,030.40
Mobilisation advance Recovery	11,11,05,011.00	11,59,693.82
<b>SUNDRY DEBTORS WRITE OFF</b>	<b>-</b>	<b>-0.22</b>

9. Ld. D.R. submitted that the submissions of the assessee have duly been considered by the Ld. CIT(A). The undisputed facts on this issue as noted by Ld. CIT(A) are as follows:

- The income has accrued to the assessee on the basis of percentage completion method followed by it and it has submitted bills to the contractee during the year under consideration.

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- The contractee has neither released the payment nor deducted any tax at source on such payments during the year under consideration. As per assessee the deductor deducts tax at source on payment basis and not on work completion basis and so it had not deducted tax at source during the year under consideration but only in subsequent years while releasing the payments.
- The contractee has released the payments and deducted tax at source in some subsequent year and the said TDS credit is getting reflected in Form 26AS of the assessee in those years of deduction.
- Since there wasn't any tax deducted at source on these unreleased payments, the issue of deposit of TDS with Government by the contractee would not have arisen and as such the same would not be there in Form 26AS for the year under consideration.
- The assessee has shown the said unrealised payments on accrual basis as it is following percentage completion method and mercantile system of accounting.
- The assessee has claimed the credit of the tax which although not deducted by the contractee but would be deductible whenever the payment would be released by the contractee in future.
- The AO has denied such credit of tax as no such tax at source was deducted by the contractee during the year under consideration.

9.1 The Ld. D.R. further submitted that the first argument of the assessee is that it should be allowed credit of the tax deductible on the payments which would be released by the contractee in future as such amounts were being declared by it as its income during the year under consideration. This argument of the assessee is found to be faulty. Mere declaration of income on accrual basis does not entitle a person to claim credit of tax if such tax at source had

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not been deducted by the deductor. Actual deduction of tax at source is a pre-requisite for availing the credit of TDS as per provisions of Section 199 of the Act. The applicability of Rule 37BA of the IT Rules would arise only after deduction of tax at source. In the case under consideration, as discussed supra, there was no deduction of tax at source at all during the year under consideration. So allowing credit of tax which would be deducted by the deductor on some future date cannot be allowed. As regards reliance of the assessee on the provisions of Section 205 of the Act, the same is also misplaced. The said Section would come into play only if tax is deductible at source and the same is actually deducted at source. Since in the case under consideration, the tax at source had not been deducted at source during the year under consideration, so applicability of Section 205 of the Act would not be there. Ld. D.R. argued that the decisions relied upon by the assessee for this argument would thus not apply.

9.2 The Ld. D.R. further stated that the assessee has relied upon the decision of the Hon'ble Punjab and Haryana High Court in the case of *CIT v Abbott Agency Ludhiana (ITA No. 206; dt. 27.09.2013)*, however the same is also misplaced. The said decision in fact supports the action of the AO. In the said case the deductor had deducted tax at source on certain payments in FY 2007-08 and the assessee had claimed tax credit of the same in AY 2008-09. The AO noted that the corresponding receipts on which tax was deducted at source were not disclosed by the, assessee in its return of income. The assessee had argued that the receipts pertained to FY 2005-06 and that it had already declared the same while filing return of income for AY 2006-07. The assessee submitted that the deductor had released the payments

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after deducting tax at source only in FY 2007-08 and as such it had not claimed any credit for TDS in AY 2006-07 but claimed the same in AY 2008-09 only after the receipt of the TDS certificate. The Ld. CIT(A) upheld the claim of the assessee and the Tribunal and High Court upheld the order of the Ld. CIT(A). So the facts are akin to the facts of the case under consideration. The assessee could not have claimed the credit of TDS without there being actual deduction of tax at source.

9.3 Ld. D.R. submitted that the assessee has also argued that the credit of TDS is required to be given even if the deductor doesn't deposit the tax with Government. This argument of the assessee doesn't help it either. In the case under consideration no tax at source has been deducted at all by the deductor during the year under consideration. So the issue of depositing the same with Government would not arise. The assessee has also not brought anything on record to show that the tax at source was actually deducted by the deductor at source but not deposited with the Government. In fact, it has itself admitted in its written submissions (as reproduced supra) that the deductor had not deducted tax at source during the year under consideration as it deducts tax at source only at the time of actual payment. Thus, the Ld. D.R. stated that the decisions relied upon by the assessee for this argument would thus not apply.

10. We have heard the rival submissions and perused the materials available on record. It is the case of the assessee that when the issue of availability of TDS credit in the appropriate assessment year is examined in the light of Section 199(3) r.w. Rule 37BA(3) of the Income Tax Rules, it would be clear that credit for tax deducted at source and

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paid to the Central Government, shall be given for the assessment year for which such income is assessable. The assessee contends that the TDS credit is available in the financial year where the corresponding income has been offered by the assessee. A reference was made to the decision of the Co-ordinate Bench in the case of *Greatship India Ltd. vs. DCIT in ITA No.5562/Mum/2018 order dated 8<sup>th</sup> June, 2020* to contend that the TDS credit cannot be postponed to a different assessment year on the basis of deduction carried out by the deductor when the accrued income from such transaction has been reported in the earlier assessment year.

10.1 A combined reading of Section 199(3) r.w. Rule 37BA(3) makes the position of law clear that credit for TDS is available in the year in which the income is reported and as a corollary, should not be deferred to some other assessment year. In the instant case, the Revenue has not allowed the credit in the subsequent assessment year also when the TDS is shown to have been credited in the form 26AS. However, as stated on behalf of the assessee, the corresponding income will not be found to be recorded and therefore such direction would belie the letter and spirit of Section 199(3) and Rule 37BA(3) thereto. Thus, on first principles, we are inclined to agree with the stand taken on behalf of the assessee for eligibility TDS credit in the Assessment Year 2017-18 itself when income has been claimed to have accrued/arisen and included for determination to chargeable income.

10.2 In the same vein, however, we note that no positive finding of the Revenue Authorities below is available to

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show as to whether tax credit for TDS reflected in form No. 26AS in Assessment Year 2018-19 has been claimed or otherwise in that assessment year. A verification of factual position is required to shun the possibility of double claim. The assessee shall be entitled to credit of TDS corresponding to the income reported in the Assessment Year 2017-18 itself provided; (i) the assessee has not claimed any credit of TDS in any other assessment year; (ii) an undertaking/affidavit is to be placed by the assessee before the Revenue Authorities to lend assurance that such credit claimed in Assessment Year 2017-18 shall not be doubly claimed in any other assessment year in future based on form 26AS or any other document. On being satisfied, the Assessing Officer shall grant the TDS credit in terms of observations made hereinabove. With these observations, the impugned order of the CIT(A) is set aside and restore back to the file of the Assessing Officer for grant of credit in AY 2017-18 in terms of our observations herein.

10.3 The same view was taken in the case of coordinate bench in the case of Interglobe Enterprises Pvt. Ltd. in ITA No.6580/Del/2019 dated 7.6.2022 for the assessment year 2016-17. In view of this, we direct the AO to give TDS credit in terms of above observation. This ground of assessee's appeal is allowed.

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11. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open court on 27<sup>th</sup> Oct, 2022

**Sd/-**  
**(Beena Pillai)**  
**Judicial Member**

**Sd/-**  
**(Chandra Poojari)**  
**Accountant Member**

Bangalore,  
Dated 27<sup>th</sup> Oct, 2022.  
VG/SPS  
Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

**Asst. Registrar,**  
**ITAT, Bangalore.**